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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. ELI FITZHUGHES MICHEL, Defendant and Respondent.	E065490 (Super.Ct.Nos. RIF10004411 & RIF1102581) O P I N I O N

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Michael A. Hestrin, District Attorney, and Emily R. Hanks, Deputy District Attorney, for Plaintiff and Appellant.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Respondent.

On January 29, 2016, the court granted defendant and respondent, Eli Fitzhughes Michel's, petition for resentencing pursuant to Penal Code section 1170.18,[1] reducing three of defendant's felony convictions to misdemeanors. On appeal, plaintiff and appellant, the People, contend the court applied the incorrect legal standard in determining defendant was not an unreasonable risk of danger to the community. We affirm.

I. PROCEDURAL HISTORY

On February 15, 2011, in case No. RIF10004411, the People charged defendant with felony theft of store merchandise from Sears (count 1; § 484, subd. (a))[2] and burglary (count 2; § 459). The People additionally alleged defendant had suffered five prior prison terms (§ 667.5, subd. (b)) and a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)).

On April 6, 2012, in case No. RIF1102581, the People charged defendant by first amended felony complaint with possession of methamphetamine (count 1; Health & Saf. Code, § 11377, subd. (a)) and possession of a hypodermic needle and syringe (count 2; Bus. & Prof. Code, § 4140). The People additionally alleged defendant has suffered four

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The People alleged defendant had been previously convicted of vehicle theft and had been imprisoned within the meaning of section 666, subdivision (b)(1) and had a prior felony conviction for burglary as specified in sections 667.5 and 1192.7, subdivision (c).

prior prison terms (Pen. Code, § 667.5, subd. (b)) and a prior strike conviction (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)).[3]

On May 11, 2012, defendant entered into plea agreements in both cases with the court. Defendant agreed to plead guilty in both cases to the counts 1 and 2 offenses. Defendant additionally agreed to admit all the alleged prior prison terms in both cases. The court agreed to strike the prior strike conviction allegations and sentence defendant concurrently in both cases.[4]

On May 14, 2012, the court sentenced defendant to an aggregate term of imprisonment of eight years eight months, execution of which the court suspended, placing defendant on 36 months of probation. The court struck sentence on the burglary conviction in case No. RIF10004411 pursuant to section 654. The court also struck sentence on all four prior prison allegations alleged in case No. RIF1102581.

On June 24, 2014, the People filed a petition to revoke defendant's probation. As part of the petition, the People alleged defendant had committed a residential burglary (count 1; § 459) and obstructed an officer in the execution of his duties (count 2; § 148,

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[3] The prior strike conviction alleged in both cases concerned defendant's conviction on July 21, 1992 for first degree burglary. (§ 459.) The People contended below that defendant had been convicted of two first degree burglaries on that date; thus rendering him susceptible to allegations that he had two prior strike convictions even though they were not *both* alleged in these cases. Defendant does not dispute this.

[4] Neither a reporter's transcript nor a minute order of the actual oral entry of defendant's pleas is contained in the record on appeal.

subd. (a)).[5] The People additionally alleged defendant had suffered five prior prison terms (§ 667.5, subd. (b)) and had violated his probation by his commission of the alleged crimes (§ 1203.2, subd. (b)).

At some point thereafter, defendant made an oral motion for resentencing pursuant to section 1170.18. The People filed opposition to defendant's motion in which the People admitted defendant was eligible for resentencing, but argued that, pursuant to the meaning of the statute, defendant posed an unreasonable risk of danger to public safety. The People contended below that enhancements, such as defendant's prior strike convictions, may be considered by the court in determining whether a defendant poses an unreasonable risk of committing a new violent felony within the meaning of section 667, subdivision (e)(2)(C)(iv).

The court found that although defendant was likely to commit another crime, he was unlikely to commit an offense which qualified as a "super strike" as enumerated in the statute. Thus, the court found defendant did not pose an unreasonable risk of danger to public safety within the meaning of the statue and granted defendant's petition.

II. DISCUSSION

The People contend the court applied the incorrect legal standard when determining defendant was not an unreasonable risk of danger to the community pursuant to section 1170.18 by declining to consider defendant's prior strike conviction for that

[5] The People apparently later charged defendant and he apparently later pled guilty to the count 2 offense. The burglary charge was dismissed.

purpose. Thus, the People argue the court erroneously granted defendant's petition for resentencing. We disagree.

"'On November 4, 2014, the voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act" (hereafter Proposition 47), which went into effect the next day. [Citation.]' [Citation.] Section 1170.18 'was enacted as part of Proposition 47.' [Citation.] Section 1170.18 provides a mechanism by which a person currently serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in subdivision (a) of section 1170.18, shall have his or her sentence recalled and be 'resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' [Citation.]" (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2.)

In determining whether a petitioner poses an unreasonable risk of dangerousness, the court may consider the petitioner's criminal conviction history, his disciplinary record while incarcerated, and any other relevevant information. (§ 1170.18, subd. (b)(1)-(3).) However, in order to find a petitioner to be an unreasonable risk of danger to public safety, the court must find that there is "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of" section 667, subdivision (e)(2)(C)(iv), a so-called "super strike." Such *violent* felonies include sexually violent offenses, oral copulation with a child under the age of 14 years, lewd and lascivious acts

with a child under 14 years, homicide, solicitation to commit murder, assault with a machine gun on a peace officer, possession of a weapon of mass destruction, *or any other serious and/or violent felony offense punishable by life imprisonment* or death. (§ 667, subd. (e)(2)(C)(iv)(I)-(VIII).) In determining that a petitioner poses an unreasonable risk of danger to public safety, the court must find that there is an unreasonable risk the petitioner will commit a super strike if resentenced. (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1265.)

"'"In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" [Citation.] In other words, "our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure."' [Citation.]" (*T.W. v. Superior Court*, *supra*, 236 Cal.App.4th at pp. 651-652.)

Here, although the court found it likely that defendant would commit another crime, even residential burglary, the court could not find that it was likely defendant would commit a statutorily enumerated violent "super strike": "There's a hundred percent chance that I will see him the minute he's released because that's his nature.

He's a criminal. [¶] However, Prop[osition] 47 says I have to find that he's likely to commit a super strike. None of his record supports that."

The People asked if it was the court's position that a "super strike" would not include a likelihood that defendant would be charged in the future with a residential burglary with attached prior strike conviction allegations which would, in effect, render him likely to commit a serious felony offense punishable by life imprisonment. The court responded that that was its position: "I believe that is not what they mean when they say a super strike. I believe that they mean one of the enumerated [offenses] liste[ed] under [section] 1192.7: murder, attempted murder. You know the list— [¶] . . . [¶] . . . —mayhem with aggravation, et cetera. That's what I . . . think it means. Not that he's managed to get himself into a 25-to-life situation because he's a three-striker. I think the People will have him back soon on that." "I don't know what's wrong with him, but he's very, very likely to be back. However, I don't believe he's likely to commit a super strike. So based on that, I'm going to grant the petition." "I do believe he will commit another residential burglary. . . . But I don't believe he's likely to commit one of the violent crimes listed."

We agree with the court's interpretation of the law. A plain reading of the statute reveals no circumstance in which the likelihood that a defendant would commit a residential burglary could be considered as evidence that he posed an unreasonable risk of danger to public safety in that there would be an unreasonable risk that the defendant would commit a new *violent* felony punishable by *life imprisonment*. (§§ 1170.18, subd.

(c), 667, subd. (e)(2)(C)(iv)(I)-(VIII).) Here, residential burglary is neither statutorily considered a *violent* felony nor is it punishable, in and of itself, by life imprisonment. The People's attempt to bootstrap defendant's prior strike convictions onto an assessment of his likelihood of committing a crime punishable by life imprisonment is neither within the letter nor the spirit of Proposition 47 or the effectuating statute.

Indeed, the determination of dangerousness is to be made upon the court's finding of whether defendant is likely to *commit* a future qualifying offense, not whether he would be *charged* with the offense and *with any prior strike convictions*. Thus, the court properly found no evidence that defendant would commit a "super strike," thereby rendering a consideration of his dangerousness to public safety necessary prior to granting his petition for resentencing.

The authors of both Proposition 47 and its effectuating legislation clearly knew how to draft language which would have rendered someone convicted of two prior strike convictions automatically subject to a dangerousness determination upon the filing of a resentencing petition had they so desired. We cannot rewrite the statute to conform to an intention which does not appear in its language. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1002; Code Civ. Proc., § 1858.)

Indeed, Proposition 36, which permits a defendant sentenced to life based upon the three strikes sentencing scheme for a nonserious, nonviolent crime the opportunity to reduce his sentence and redesignate the substantive offense of which he was convicted; that resentencing scheme also had a dangerousness hurdle the defendant had to overcome

in order to obtain resentencing; however, the effectuating statue gave the court far broader discretion in determining dangerousness than does Proposition 47. (See *People v. Arevalo* (2016) 244 Cal.App.4th 836, 844-845, 849-854.) This suggests that the authors of Proposition 47 wished to circumscribe the court's power in determining dangerousness to narrowly limit such a determination to the likelihood defendant would *commit* one of the crimes specified in the statute, not whether he would be *charged* and *alleged* with other crimes and *prior conviction allegations*.

The People exposit *People v. Williams* (2014) 227 Cal.App.4th 733 and *People v. Jones* (2009) 47 Cal.4th 566 for the proposition that the "Three Strikes" law is a penalty provision, not an enhancement; thus, its effect upon a charged substantive crime must be considered when a court is sentencing a defendant. In *Williams*, a jury convicted the defendant of several substantive offenses and found defendant had committed each offense for the benefit of a criminal street gang. The defendant admitted he had suffered two prior strike convictions. The court sentenced the defendant to terms of 25 years to life on each of the substantive offenses and a consecutive 10-year term on each count for the gang enhancement, rather than the 15-year minimum parole eligibility requirement found in the gang statute. The defendant argued that the court erred in imposing the additional 10-year term on each count instead of the 15-year minimum parole term. (*People v. Williams*, *supra*, at p. 736.)

The court held that: "The Three Strikes law is a penalty provision, not an enhancement. It is not an enhancement because it does not add an additional term of

imprisonment to the base term. Instead, it provides for an alternate sentence (25 years to life) when it is proven that the defendant has suffered at least two prior serious felony convictions." (*People v. Williams*, *supra*, 227 Cal.App.4th at p. 744.) Thus, the sentence for the defendant's substantive offenses was 25 years to life even if the statutorily enumerated terms of imprisonment for those offenses without prior strike allegations would not have been life sentences. (*Id*. at p. 745.) Therefore, the court had erred in imposing the 10-year additional terms because it could either have imposed the 10-year terms or the life terms, but not both. (*Ibid.*)

In *Jones*, which *Williams* relied upon almost exclusively, a jury convicted the defendant of shooting at an inhabited dwelling and found that he had committed the offense to benefit a criminal street gang, and personally and intentionally discharged a firearm in his commission of the offense. The court also convicted the defendant of the unlawful possession of a firearm and found true an allegation that he did so to benefit a criminal street gang. The court also convicted the defendant of the substantive offense of participating in a criminal street gang. On the offense of shooting at a dwelling, the court imposed a seven-year prison term which it then enhanced with a term of life imprisonment, with a minimum parole date of 15 years, plus 20 years as an enhancement for personally and intentionally discharging a firearm in his commission of the offense, a punishment only permitted where a defendant has committed an offense punishable by life imprisonment. (*People v. Jones*, *supra*, 47 Cal.4th at p. 569.) The appellate court

held that the court should have simply imposed the life term as an alternative penalty rather than the life term and the sentencing enhancement. (*Id*. at p. 570.)

The California Supreme Court granted review on the issue of whether a defendant who commits a specified felony to benefit a criminal street gang has committed a felony punishable by imprisonment for life which would subject him to the additional 20-year prison term. (*People v. Jones, supra*, 47 Cal.4th at pp. 571-572.) The defendant argued the court was impermissibly bootstrapping the gang enhancement onto the substantive crime to transform it into an offense punishable by life imprisonment rather than seven years; thus allowing the additional 20-year term to be applied. (*Id*. at pp. 572-575.) The *Jones* court disagreed with the defendant, holding that by committing an offense in a manner in which he could be sentenced to life imprisonment under an alternative penalty provision, rather than an enhancement, the defendant was subject to the additional 20-year term of imprisonment. (*Id*. at pp. 575, 577-578.)

The People argue, pursuant to *Williams* and *Jones*, that the court here should have considered that if it found defendant likely to commit a residential burglary in the future, it should also have found that such an offense would be punishable by life imprisonment under the Three Strikes law. Thus, the court should have considered this in determining whether defendant posed an unreasonable risk of danger to public safety in the likelihood that he would commit a new violent felony. We find *Williams* and *Jones* distinguishable.

First, in both cases the analysis focused on the nature of the crime committed by the defendants, not the defendants' prior record of conviction. Second, in both cases the

defendants had already been determined to be guilty beyond a reasonable doubt of the offenses for which they were convicted and the allegations and enhancements had been found true. Here, under the People's reasoning, the court would be required not only to speculate on whether defendant would *commit* a particular future crime, but also whether the People would both *charge* him with that crime and whether they would *charge* and *prosecute* both the substantive offense and *both prior strike conviction allegations* as well.

It is notable here that in neither of the underlying cases did the People allege *both* prior strike allegations. Thus, even though in the People's interpretation of the statute defendant could have been viewed as having committed offenses punishable by life imprisonment, the People did not charge him with both prior strike convictions; therefore, defendant was not subject to life imprisonment for his underlying crimes. Moreover, here the court struck the single prior strike conviction allegations in both underlying cases. Thus, accepting the People's framework for determining dangerousness would also necessarily require the court to determine whether a future court might strike any alleged prior strike convictions or whether the People might plead the case down by agreeing to dismiss the prior conviction allegations.

Third, both *Williams* and *Jones* dealt with gang statutes, not resentencing provisions. Fourth, in *Williams* and *Jones* the courts were dealing with prospective sentencing. The instant case deals with retrospective *re*sentencing.

The People also rely upon the statements of Couzens and Bigelow: "Taking into consideration the intent of the enactors that the provisions of Proposition 47 be liberally and broadly construed to exclude dangerous and violent offenders from any of its benefits, it seems consistent that courts should consider the effect of enhancements in determining whether a particular person is excluded as having suffered an offense punishable by a life sentence." (Couzens & Bigelow, Proposition 47: "The Safe Neighborhoods and Schools Act" (May 2016) pp. 15-16<http://www.courts.ca.gov/documents/Prop-47-Information.pdf>[as of Nov. 29, 2016].) "Nothing in the initiative or in logic indicates that the enactors would want courts to exclude offenders who were convicted of crimes with stand-alone life terms, but not exclude offenders who got life terms because of an enhancement—these are all dangerous and violent persons." (*Id. at* p. 16.)

Notably, here, defendant was not convicted of any statutorily enumerated "dangerous and violent" offense. Likewise, Couzens and Bigelow's pronouncements are secondary authority and nonbinding on this court. Moreover, we do not find their arguments persuasive. Indeed, as pointed out by defendant, the argument against Proposition 47 noted that it "prevents judges from blocking the early release of prisoners except in very rare cases. For example, even if the judge finds that the inmate poses a risk of committing crimes like kidnapping, robbery, assault, spousal abuse, torture of small animals, carjacking or felonies committed on behalf of a criminal street gang, Proposition 47 requires their release." (Voter Information Guide, Gen. Elec. (Nov. 4,

2014) argument against Prop. 47, p. 39<http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf>[as of Nov. 29, 2016].)

Thus, even if the court found a defendant likely to commit these enumerated *violent* felonies, the court would still be unable to find the defendant posed an unreasonable risk of danger pursuant to the statute, regardless of whether the defendant had prior strike convictions. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 906 ["[A]s a reviewing court is directed to look at the arguments contained in the official ballot pamphlet to ascertain voter intent, it is well settled that such an analysis necessarily includes the arguments advanced by both the proponents and opponents of the initiative."].)

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

SLOUGH
J.